Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1803

JONATHAN GRASSI;
JAMES R. GREEN;
and
LARRY A. CANNON,

Petitioners,

v.

THE STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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THE STATE OF LOUISIANA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

The petitioners, JONATHAN GRASSI, JAMES R. GREEN and LARRY A. CANNON, respectfully ask that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court for the State of Louisiana.

OPINIONS BELOW

On December 13, 1979 the Supreme Court of the State of Louisiana affirmed the judgment of the Sixteenth Judicial District Court, Parish of St. Martin. See Appendix A. A petition for a rehearing was filed on or about the 17th of January, 1980, which was subsequently denied.

JURISDICTION

Jurisdiction of this appeal is grounded in a December 13, 1979 decision of the Supreme Court for the State of Louisiana and their subsequent denial of an application for a rehearing. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. 1257.

QUESTION PRESENTED FOR REVIEW

1. Whether the proper standard was used when common law property concepts were arbitrarily applied to determine whether Petitioners' reasonable expectation of privacy was violated for purposes of determining the applicability of the Fourth Amendment, when law enforcement authorities trespassed onto private property owned by a co-defendant and secreted themselves for purposes of surveillance, when said surveillance could not have been accomplished absent the trespass.

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment, United States Constitution:

The right o t he people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

PREFATORY STATEMENT

All references to the record in this case will be preceded by the capital letter "T".

STATEMENT OF THE CASE

Petitioners were charged with violating the state laws of Louisiana in that they possessed with intent to distribute marijuana. Petitioners, with the other co-defendants in the case, filed a joint motion to suppress evidence, including the contraband seized. This motion attacked the constitutional validity of the search and seizure in question. This motion was denied and as a result of said denial the petitioners entered a plea of guilty on March 12, 1979 expressly reserving their right to appeal denial of the Motion to Suppress Evidence. An appeal was taken to the Supreme Court of The State of Louisiana, which affirmed the judgment on December 13, 1979. A petition for a rehearing was filed on or around the 17th of January, 1980, which was subsequently denied.

Petitioner respectfully submits the following chronology with respect to the "search and seizure" issue presented here.

On June 15, 1978, at approximately 3:00 o'clock, p.m., a joint task force of United States Customs Air Officers and Louisiana State Police commenced a surveillance of a rural residential compound, which was the home of co-defendants, Jeff H. Dupuis and Bernis H. Davison. This surveillance was begun following the arrival of a refrigerator truck and two bobtail trucks at the property. This residential compound, including its environs, is bounded on the west by State Highway 349; on the north by the Parish Road; and on the east and south by the edge of plowed fields of growing sugar cane, the field to the south being included in the Dupuis property. (T-500-03; 506-10; 519; 520; 522; 523; 529; 537).

The daylight activities of the joint governmental task force was limited to "roving surveillance" from vehicles

operating on the two public highways which formed the north and west borders of the Dupuis property. The roving surveillance consisted of officers driving by the property to briefly ovserve what, if any, activity was taking place. (T-343-45; 565; 647; 468; 668).

Frustrated by their inability to observe either the trucks or any other activity within the compound from their vantage point on the public highway, United States Customs Officers Wade and Louisiana State Trooper Le Jeune proceeded on foot through the Dupuis property and surreptitiously secreted themselves in the sugar cane field immediately south of the Dupuis residence. The law enforcement officers moved about within the 3-4 foot high cane fields, located on the Dupuis property from time to time. (T-432; 437; 439; 443-448; 451; 475; 567; 568; 572; 577; 578; 593; 594; 595; 641; ∪42.)

The outer boundaries of the Dupuis property were clearly defined by a gully on the south, the Parish Road on the north and a fence along Highway 349 on the west side. (T-439; 443-46; 520; 522; 532; 534-35; 541-42; 577; 578; 593-95). Officers testified that at all times their on-foot surveillance activities were conducted from within these boundaries, but they indicated that they were not at all concerned with the possibility of being on private property or on the Dupuis property. While the officers were generally located approximately 25 to 40 yards south of the Dupuis house, at least once, Louisiana State Police Officer Le Jeune crept to the edge of the cane, approximately ten (10) yards from the house. (T. 380-82; 439; 443-46; 446-48; 475; 532; 534-35; 541-42; 567; 568; 572; 577-79; 593; 595; 607-08; 641-42).

During the evening, the officers observed the petitioners having a barbeque in the Dupuis' backyard. During

this time, the three trucks remained stationary within the compound. (T-451; 482; 567).

At approximately 11:30 p.m., four hours after the initial trespass, the officers observed the barbeque come to an end. At that time, they observed activities around the trucks in question. These activities included backing one of the bobtail trucks, flush to the rear of the refrigerator truck and of transferring large bales of an unknown substance from one truck to another. Officer Wade admitted in testimony that he had no objective reason for believing that the bales contained contraband, although he suspected as much. (T-470-484).

After observing the bales, officer Wade contacted Customs Air Officer Joachim who in turn proceeded to telephone a United States Magistrate for purposes of obtaining a search warrant. A warrant was issued which was later stipulated by the parties to be invalid. A search and seizure then went forward, which resulted in the discovery of contraband. As a result of the pleas entered in this case, the petitioners were sentenced to a term of three (3) years and fined a total of $15,000.00, with two additional years to be served upon the default of the payment of said fine. (T-797).

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS SIGNIFICANT ISSUES DEALING WITH WHETHER THE ARBITRARY APPLICATION OF COMMON LAW PROPERTY CONCEPTS IS THE PROPER STANDARD TO BE APPLIED WHEN DETERMINING WHETHER A PARTY ON PRIVATE PROPERTY HAS HIS REASONABLE EXPECTATION OF PRIVACY VIOLATED FOR PURPOSES OF DETERMINING THE APPLI-

CABILITY OF THE FOURTH AMENDMENT, WHEN LAW ENFORCEMENT AUTHORITIES TRESPASSED ONTO PRIVATE PROPERTY OWNED BY A CO-DEFENDANT AND SECRETED THEMSELVES FOR PURPOSES OF SURVEILLANCE, WHEN SAID SURVEILLANCE COULD NOT HAVE BEEN ACCOMPLISHED ABSENT THE TRESPASS. REVIEW IS NECESSARY TO BRING TO THIS COURT'S ATTENTION A PRECEDENT SETTING ERROR OF THE SUPREME COURT OF LOUISIANA CONCERNING THE CRITICAL QUESTION OF WHAT CONSTITUTES A REASONABLE EXPECTATION OF PRIVACY. REVIEW IS FURTHER NECESSARY AS NUMEROUS CIRCUITS AND STATES CONTINUE TO APPLY STANDARDS IN DETERMINING WHAT IS A REASONABLE EXPECTATION OF PRIVACY WHICH ARE FOUNDED ON PRECEDENT PREDATING *KATZ V. UNITED STATES*, 389 U.S. 347 (1967) AND AS ARE SUCH IN DIRECT CONTRAVENTION TO THAT CASE.

A. PETITIONERS FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN AN IMPROPER, OUTMODED STANDARD WAS USED TO DETERMINE IF THE PETITIONERS WERE ENTITLED TO FOURTH AMENDMENT PROTECTION WHERE THEIR REASONABLE EXPECTATION OF PRIVACY WAS VIOLATED, WHEN LAW ENFORCEMENT AUTHORITIES TRESPASSED ONTO PRIVATE PROPERTY AND SECRETED THEMSELVES FOR PURPOSES OF SURVEILLANCE, WHEN SAID SURVEILLANCE COULD NOT HAVE BEEN ACCOMPLISHED ABSENT THE TRESPASS.

The Fourth Amendment prohibits unreasonable searches and seizures. A party however is not entitled to the protection of the Fourth Amendment unless there exists a reasonable expectation of privacy. *Rakas v. Illinois*, _____ U.S. _____, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978). To determine if there exists a reasonable expectation of privacy it is necessary to determine if a party has exhibited an actual subjective expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347 (1967). This definition was deliberately intended to be ambiguous, since "what is reasonable in one setting may be unreasonable in another." *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir. 1979). Accordingly, a case by case determination must be made to determine if there is a reasonable expectation of privacy since *Katz* "was written to resist captivation in any formula." Amsterdam, Prospectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 385 (1974).

Prior to *Katz*, a number of formulas had been applied seeking a ready made answer as to when a party was entitled to the protection of the Fourth Amendment. In *Hester v. United States*, 265 U.S. 57 (1924) this Court held as an absolute rule that the protection of the Fourth Amendment did not apply to people who were in open fields. This decision, based on the premise, that people who were visible from a vantage point, outside their property could not expect to keep their actions private soon expanded, so that an "open field" became anything that was not within the curtilage of certain property, whether it was visible from outside the property or not. *Care v. United States*, 231 F.2d 22, 25 (10th Cir. 1956).

This sort of mechanistic approach was precisely what

the Supreme Court rebelled against in *Katz*, with its holding that the Fourth Amendment protected people and not places. Several courts in reaction to *Katz* held that "*Hester* no longer has any independent meaning, but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy." *United States v. Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976). The Supreme Court of Colorado is an en banc decision further held in *People v. Weisenberger*, 516 P.2d 1128 (1973) that property outside of the curtilage may be a constitutionally protected area provided that the occupant of the property had a reasonable expectation of privacy. "Thus, the proper focus is no longer on common law property concepts." *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968).

A number of courts however have continued to apply common law concepts of property in such an arbitrary fashion as to suggest that they are ignoring the prescriptions of *Katz* to review cases on a case by case basis. The court in *United States v. Williams*, 581 F.2d 451 (5th Cir. 1978) after recognizing *Katz* held, "that open fields surrounding a house are not protected under the Fourth Amendment and that a search of them need not be accompanied by a warrant issued upon probable cause." That case then proceeded to define curtilage by citing to *Hodges v. United States*, 243 F.2d 281 (5th Cir. 1957), a pre *Katz* case. In *United States Ex Rel. Saiken v. Bensinger*, 546 F.2d 1292 (7th Cir. 1976), the Court did not refer at all to *Katz* and cited *United States v. Sorce*, 325 F.2d 84 (7th Cir. 1964) a pre *Katz* case in holding that, "the protection of the Fourth Amendment does not extend to open fields." The systematic formulation of this case was emphasized by the fact that the case included a chart attempting to set forth specific standards in terms

of distance in order to define curtilage. The open field doctrine was also adopted by the Court in *United States v. Basile*, 569 F.2d 1053 (9th Cir. 1978).

Petitioners assert herein that the decisions of *Williams*, *Bensinger* and *Basile* are incorrect in that they fail to make case by case determinations as anticipated by *Katz*. Petitioner further asserts that the Supreme Court of Louisiana in holding against the petitioners relied to too great a degree on the "open fields—curtilage" doctrine and in doing so neglected to consider the fundamental question of whether the petitioners reasonable expectation of privacy was violated. This is of the utmost significance in the case at hand, since if their reasonable expectation of privacy was violated, the entry onto the property in question by law enforcement officers would be a search as contemplated by the Fourth Amendment. *United States v. Jackson*, 585 F.2d 653 (4th Cir. 1978). Such a search would of course need be supported by probable cause (The Supreme Court of Louisiana conceded that lacking the trespass and the fruits derived therefrom, there was no probable cause) and absent such probable cause any evidence seized pursuant to it should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Cruz*, 581 F.2d 535 (5th Cir. 1978).

The Supreme Court of Louisiana in its opinion did take note of *Katz* and further took note of several of its own cases in which it gave paramount consideration to the concept of "reasonable expectation of privacy." In considering the case at hand however, the Court was too quick to resort to outmoded property right concepts and in so doing found them to be dispositive of the issue, instead of being merely a factor to consider as to whether

there had been a violation of the petitioner's reasonable expectation of privacy.

Here the activities which were the subject of the surveillance took place in the evening under cover of darkness. They were further conducted at a removed rural compound and were done in such a manner that they were not visible from the public roads which boarded the compound. In addition they were concealed by fields of growing sugar cane which was high enough and dense enough to conceal two law enforcement agents. Finally, the trucks which were used in the activities under question were backed flush to one another, allowing the observing agents a very short period of time to observe their contents. At least part of the observation which was made was conducted by use of night viewing equipment. (T-470-484). From these facts it is no doubt clear, that the petitioners exhibited an actual subjective expectation of privacy.

The above facts would also be relevant as to whether the expectation of privacy was one that society was prepared to recognize as reasonable. Also relevant would be the nature and extent of the intrusion since, "those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties" are searches. Harlan J. dissenting in *United States v. White,* 401 U.S. 745 (1971). Here, the intrusion was extensive. The observation which was begun around 3:00 p.m. continued past midnight. In addition, several officers committed a trespass onto the property in question and secreted themselves for an excess of four hours, and used night viewing equipment as noted above. Such activities cannot be reasonably anticipated by parties who seek to have a reasonable expecta-

tion of privacy.

Of special interest in the case at hand is the trespass. Petitioner does not seek to assert that any trespass automatically violates a reasonable expectation of privacy, since it like "open fields" is a common law property concept. Nonetheless, it is relevant to the extent that "it represents an invasion of a defendant's reasonable expectation of privacy." *United States v. Jackson, supra,* 659. Also relevant in this regard is the case of *United States v. Carriger,* 541 F.2d 545, 549 (6th Cir. 1976) which held that "trespassing is one form of intrusion by the government that may violate a person's reasonable expectation of privacy." This view was justified under *Katz* the court noted, since the "determination that the trespass doctrine could no longer be regarded as controlling was intended to expand the protection afforded by the Fourth Amendment". The practical result however, has been the abandonment of the concept of trespass, while the concepts of "open fields" and "curtilage" have been allowed to grow and flourish.

Such a result orientation seems to have motivated the Supreme Court of Louisiana in the case at hand. Faced with the question of whether the Petitioners should have taken steps to conceal themselves and their activities from those who trespassed onto their property and concealed themselved in a sugar cane field for an extensive period of time, the Court saw fit to decide the case on the fact that no signs, fences or gates were posted to exclude the public. (A-4). This combined with the "open fields-curtilage" distinction was sufficient for them to affirm the conviction, although even in this regard, the Court never stated as a matter of law that the petitioners were outside the curtilage. (In adopting this distinction,

the Court adopted what they believed to be the Fifth Circuit rule, "that the search of open fields surrounding a house are not protected under the Fourth Amendment"). (A-4) Such a holding not only restricts the application of the Fourth Amendment, but flies directly in the face of previous case law enunciated by that very Court.

In *State v. Byers*, 359 So.2d 84 (1978), the Supreme Court of Louisiana overturned a conviction for a small amount of marijuana noting that the "open fields" doctrine of *Hester* did not apply and further holding that, "The question of whether the property was legally posted in compliance with state law is not decisive, and the issue is one of expectation of privacy." This view is in line with the case of *State v. Fearn*, 345 So.2d 468 (1977) which overturned a conviction for a small number of marijuana plants which were not visible except under close inspection. There, as in the case at hand, the only boundaries were natural ones. There however (despite the similarities of the case), the Court held that the appellants were entitled to a reasonable expectation of privacy.

Ultimately, the Fourth Amendment is meant to insure the right to be left alone. Increasingly however, Courts have sought to erode this right, by limiting the application of the Fourth Amendment. By continuing to apply property concepts, the courts have instead of liberalizing the Fourth Amendment, given themselves an easy handle to adopt in order to justify a pre-ordained result. Consequently, assertion of Fourth Amendment rights, will be limited to those few who adopt mechanistic precautions and not to those who honestly and correctly believe that they are entitled to a reasonable expectation of privacy. Such a result would be contrary to *Katz* and the Fourth Amendment and accordingly, the Supreme Court should issue a writ of certiorari.

CONCLUSION

Based on the foregoing reasons, the Petitioner contends that the Supreme Court for the State of Louisiana erred in its decision concerning the novel issue presented to it and misapplied controlling authority to the circumstances involved in Petitioner's situation. Thereafter, a Writ of Certiorari should issue to review the judgment of the Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served, the Attorney General, New Orleans, Louisiana with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 12th day of May, 1980.

By: Edward T. M. Garland
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APPENDIX A

Dec. 13, 1979

SUPREME COURT OF LOUISIANA

NO. 64,762

STATE OF LOUISIANA

VERSUS

JEFF H. DUPUIS, BERNIS H. DAVIDSON, JOHN R. PERDIAN, WILBUR L. SMITH, JONATHAN GRASSI, JAMES R. GREEN, JR. AND LARRY A. CANNON

On Appeal from the 16th Judicial District Court, Parish of St. Martin
Hon. Edward A. de la Houssaye, III, Judge

BLANCHE, Justice.*

The defendants were charged by a bill of information with the possession of marijuana with the intent to distribute in violation of La. R.S. 966(a). After the defendants' motion to suppress the twenty tons of marijuana as evidence was denied, they plead guilty reserving all rights to appeal the denial of the motion to suppress. Each defendant was sentenced to three years at hard labor and fined $15,000, in default of which each would serve two years.

The police were led to the Dupuis property and the marijuana through a series of events beginning with the

*Honorable Jesse N. Stone, Jr. served as Justice Ad Hoc in the vacancy created by the resignation of Tate, J.

discovery of an aircraft in Georgia loaded with 23,000 pounds of marijuana. The aircraft was registered to Marvin Zylstra. A few days before Jeff Dupuis had rented a car as the agent of Marvin Zylstra from an Avis Rent-a-Car facility in the Dalton, Alabama airport. After a check of the Breaux Bridge, Louisiana address given by Dupuis, a refrigerated truck was found on the property. This truck was registered to a Mr. Zerbe, who was also known to be an associate of Zylstra through information obtained from the El Paso Intelligence Center. On June 11, 1978, the refrigerated truck left the Dupuis property and returned June 15, 1978 along with two bobtail trucks bearing Georgia license plates. In light of this information, the authorities expected the trucks to depart shortly to pick up a load of marijuana. Therefore, a joint task force of United States Customs Air Officers and Louisiana State Police commenced a surveillance of the Dupuis residence in order to determine when the trucks would leave.

The rural residential area under police surveillance was a corner tract on which is located a house belonging to the defendant Jeff Dupuis, and a mobile home occupied by the defendant Bernis Davidson. This compound was bounded on the west by State Highway 349, on the north by a parish road, and on the east and south by fields of sugar cane. Between the sugar cane field and the house ran a shell road.

Until 7:30 p.m., the officers' activities consisted of simply a roving surveillance on the public roads. At 7:30 p.m., two officers proceeded by foot from the parish road on the north side of the property through the sugar cane field to a point south of the Dupuis yard. About 11:00 p.m., the officers noticed that the thre etrucks parked on

the private road between the residence and the fields were being maneuvered for some loading operation. When the rear doors of the trailer were opened, one of the officers, through the use of night viewing equipment, observed large bales of a substance he presumed to be marijuana because of the size and shape of the bales. Later, when the first bobtail truck moved from the back of the trailer, the interior light of the truck allowed the officers to see the bales with their unaided eyes. At this point, the officers attempted to obtain a telephone search warrant. After obtaining the warrant, the officers moved in and arrested the defendants and seized the trucks and their contents.

The state has stipulated that the warrant obtained by the officers is invalid since the requirements for a telephone search warrant had not been met. Based upon these facts, the trial court denied the defendants' motion to suppress. The defendants have urged that the original trespass onto their property (the sugar cane fields) for the purpose of observing their activities violated their Fourth Amendment right to privacy. In Katz v. U.S., 389 U.S. 347 (1967), the United States Supreme Court abandoned the notion that the Fourth Amendment protection was implemented in certain "constitutionally protected areas". The courts will now look to the defendant's reasonable expectation of privacy in determining whether the Fourth Amendment applies. In determining whether one has a reasonable expectation of privacy, the test is not only whether the person had an actual or subjective expectation of privacy but also whether their expectation of privacy is of the type which society at large is prepared to recognize as being reasonable. State v. Wilbourn, 364 So.2d 995 (La. 1978). In applying the test,

it has been held that a search and seizure conducted on the private land of defendant for marijuana violated the Fourth Amendment where the marijuana was not visible from the public road and the private road was posted and a chain barred access to the private road. State v. Byers, 359 So.2d 84 (La. 1978).

In State v. Fearn, 345 So.2d 468 (La. 1977), the court found that the defendant had a reasonable, although not justified, expectation of privacy because his marijuana plants could not be seen from his parents' house. For this reason, the seizure was held invalid. However, the court noted that the initial viewing of the plants from the neighbor's yard by the police was not an intrusion since the plants were clearly visible from this point.

In examining the reasonableness of the defendant's expectation of privacy, the distinction between open fields and curtilage may be helpful. The Fifth Circuit has held that the search of open fields surrounding a house are not protected under the Fourth Amendment since there is no reasonable expectation of privacy. U.S. v. Brown, 473 F.2d 952 (5th Cir. 1973). Thus, in U.S. v. Williams, 581 F.2d 451 (5th Cir. 1978), the Fifth Circuit upheld the seizure of moonshine from the defendant's shed where officers had detected the odor of mash while standing outside the curtilage of defendant's home despite the fact that they had trespassed onto his property.

In the instant case, the field from which the defendants' operations were observed was leased to others for agricultural purposes. Thus, the field like the neighbor's yard in *Fearn*, was not exclusively in the control of the defendant. There were no signs, fences or gates to exclude the public as in *Byers* from the area. In fact, any stranger could have driven down the shell road or been in the

field and observed the defendants' loading activities.

As in *Williams*, the police's observations were made from a field outside the curtilage of the Dupuis home. Although the officers were trespassing, the defendants had no reasonable expectation of privacy as to this field. Of course, the use of extrasensory means of probing does increase the extent of an intrusion. The problem created by the use of night viewing equipment is pretermitted here since the police officer testified that he was able to clearly discern the characteristic wrappings of bales of marijuana with his unaided eyes as the bobtail truck pulled off. Therefore, we conclude that the initial sighting of the marijuana by the officers from the sugar cane field did not violate the Fourth Amendment since the defendants had no reasonable expectation that their activities would remain private.

The state has conceded that the telephone search warrant is invalid. Therefore, the seizure of the trucks and their contents must be justified as a warrantless seizure. The rule is well established that warrantless searches and seizures are unreasonable unless they fit within one of the limited number of well-delineated exceptions to the warrant requirement. State v. Guzman, 362 So.2d 744 (La. 1978); State v. Daigre, 364 So.2d 902 (La. 1978).

One of these exceptions to the warrant requirement is the so-called "automobile exception". This exception is based upon the existence of probable cause to search the vehicle and exigent circumstances which render it impractical to secure a warrant. State v. Spencer, 374 So.2d 1195 (La. 1979).

In determining whether the officers had probable cause to seize the marijuana, we must determine if under the

facts and circumstances known to the police at the time of the seizure, a reasonable person would conclude that contraband was present. In this case, officers received information from various criminal intelligence sources linking the defendants with persons suspected of narcotics trafficking in Georgia. The officers observed three trucks being maneuvered in total darkness into a loading position. Further, from their position in the cane field, they saw what appeared to be bales of marijuana.

Although the sighting of the bales alone may have been sufficient to justify a belief that contraband was present, it should be noted that there were other underlying facts which supported the police's suspicions. Customs officials had discovered an abandoned plane in Georgia filled with marijuana and registered to Marvin Zylstra. The defendant, Jeff Dupuis, had rented a car in Alabama as Mr. Zylstra's agent. Further, officers discovered a refrigerated truck at the Dupuis residence which was registered to Mr. Zerbe, an associate of Mr. Zylstra. The officers testified that such refrigerated trucks are a common method of transporting marijuana. This information, although insufficient in itself to establish probable cause, was enough to arouse police suspicions. The subsequent arrival of trucks bearing Georgia license plates, the midnight loading activities and the sighting of the bales combined with the other information were sufficient facts and circumstances to constitute probable cause.

We also conclude that exigent circumstances existed. One of the bobtail trucks had already been unloaded into the refrigerated truck within 20 or 30 minutes. At this point, the officers tried to get the warrant. After another 20 minutes had passed, it was reasonable to conclude that the loading operations were almost complete and that

the trucks would be leaving. Since the departure of the trucks was imminent, the officers were justified in moving in to arrest the defendants and seize the trucks without waiting to secure a warrant. See State v. Spencer, supra. The trial court properly denied the defendants' motion to suppress since the search and seizure did not violate the Fourth Amendment's protection against unreasonable searches and seizures.

For the reasons assigned, the judgment of the trial court is affirmed.

AFFIRMED.

* * *

No. 79-1803
No. 79-2045

Supreme Court, U. S.
FILED
JUL 18 1980
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No. 79-1803

JONATHAN GRASSI, JAMES R. GREEN,
and LARRY A. CANNON,

Petitioners,

VERSUS
THE STATE OF LOUISIANA

Respondent.

No. 79-2045

JEFF H. DUPUIS, BERNIS H. DAVISON
JOHN ZERBE and WILBUR L. SMITH

Petitioners

VERSUS
STATE OF LOUISIANA

Respondent

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

I.

Did the lower courts err in holding that petitioners had no reasonable expectation of privacy regarding their nighttime maneuvers of three trucks parked on an open roadway outside of the fence surrounding petitioners' curtilage but adjoining an unfenced open sugar cane field under lease to a third party and from which unfenced cane field narcotics agents were monitoring the movements of the suspect trucks for the purpose of following said trucks to a suspected marijuana transfer point elsewhere, and during which maneuvers petitioners carelessly illuminated the contents of the trucks so that the watching agents unexpectedly observed, with the naked eye, the presence of many large bales of marijuana already loaded in the trucks?

II.

Did the lower courts err in holding that the narcotics agents monitoring the movements of petitioners' three trucks, with the expectation that the trucks were about to move on to an unknown marijuana pickup point, having suddenly and unexpectedly observed with the naked eye large numbers of bales of what the agents recognized as marijuana being transferred from a large truck to the two smaller trucks, the narcotics agents had probable cause and sufficient exigent circumstances to authorize immediate warrantless arrest of petitioners and seizure of the contraband before the trucks were moved to the open highway?

LIST OF ALL PARTIES TO THE PROCEEDINGS

There were seven defendants in the Louisiana courts. In petitioning this Honorable Court for the writ of certiorari, the parties have done so in two separate groups.

In No. 70-2045. the petitioners are Jeff H. Dupuis, Bernis H. Davison, John Zerbe, and Wilbur L. Smith.

In No. 79-1803, the petitioners are Jonathan Grassi, James R. Green, and Larry A. Cannon.

Respondent's brief herein is in response to both groups of petitioners - No. 79-1803 and No. 79-2045.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Respondent herein opposes petitioners' application for the writ of certiorari to review the judgment of the Supreme Court of Louisiana, entered December 13, 1979, rehearing denied January 28, 1980, declining to overrule a decision of the trial court which denied petitioners' motion to suppress certain evidence.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana in ***State of Louisiana v. Dupuis, et al*** is reported at 378 So.2d 934 (La. 1979). a copy of which is already attached to petitioners' brief in Appendix B.

JURISDICITON

The jurisdictional aspects of this matter are accurately set forth in petitioners' brief, and will not be repeated here.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this matter are satisfactorily set forth in petitioners' brief.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is generally accurate except that it overlooks three very important facts that are in the record:

1) The transferring of the marijuana from the larger trucks to the smaller trucks was observed by the officers in the ad-

joining cane fields not only by means of night vision devices, but also by means of the unaided eye (Tr. 470-478, 568-572)

2) Although the Dupuis family did in fact have fee title to the cane fields in which the officers were concealed, that property had been leased to an unnamed third party, leaving the Dupuis family with only a reversionary interest in the property (Tr. 519, 524, 525, 538, 539). Petitioners' brief repeatedly and misleadingly refers to the cane fields as "the Dupuis property."

3) The geographical location of petitioners' fenced curtilage vis-a-vis the roadway, the adjoining cane fields, and the adjacent highways, being of critical importance in evaluating the petitioners' "reasonable expectation of privacy", respondent is including as part of his Appendix herein, copies of photographs introduced by petitioners into evidence at the suppression hearing in order that this Honorable Court might understand the situs of the dispute. (D - 6, 8, 9, 10).

QUESTIONS PRESENTED

I.

Did the lower courts err in holding that petitioners had no reasonable expectation of privacy regarding their nighttime maneuvers of three trucks parked on an open roadway outside of the fence surrounding petitioners' curtilage but adjoining an unfenced open sugar cane field under lease to a third party and from which unfenced cane field narcotics agents were monitoring the movements of the suspect trucks for the purpose of following said trucks to a suspected marijuana transfer point elsewhere, and during which maneuvers petitioners carelessly illuminated the contents of the trucks so that the watching agents unexpectedly observed, with the naked eye, the presence of many large bales of marijuana already loaded in

the trucks?

II.

Did the lower courts err in holding that the narcotics agents monitoring the movements of petitioners' three trucks, with the expectation that the trucks were about to move on to an unknown marijuana pickup point, having suddenly and unexpectedly observed with the naked eye large numbers of bales of what the agents recognized as marijuana being transferred from a large truck to the two smaller trucks, the narcotics agents had probable cause and sufficient exigent circumstances to authorize immediate warrantless arrest of petitioners and seizure of the contraband before the trucks were moved to the open highway?

ARGUMENT

I.THE TELEPHONE SEARCH WARRANT

As was brought out at the hearing on the motion to suppress, the effort to obtain a telephone search warrant from a federal magistrate was botched by both Customs Officer Joachim and Magistrate Herbert. In fairness to both of these individuals, it must be remembered that neither of them had ever before attempted to carry out the newly-enacted procedures of Rule 41 (c) (2), F.R,Cr.P. (Tr. 299, 375). In fact, Joachim did not even have the necessary forms available at his end (Tr. 382), Herbert had received the call after midnight (Tr. 297), and Joachim was acting under the stress of considerable urgency (Tr. 406). It is small wonder that the warrant was invalid, but the fact that Joachim made the effort, despite Sergeant Trahan's reluctance to hold off the arrests while this was going on (Tr. 632), reflects Joachim's good faith.

In any event, at the hearing, the State conceded the invalidity of the warrant (Tr. 557, 558), and will not defend

it in this brief. It is submitted, however, that the abortive but good faith attempt to obtain a federal search warrant did not invalidate the ensuing arrests and seizures which were valid for reasons that having nothing to do with the federal search warrant. The invalid search warrant does not preclude reliance upon other grounds which support the legality of the officers' actions. *United States v. Jones*, 475 F.2d 723 (5th Cir. 1973), *cert. den.* 94 S. Ct. 96, 414 U.S. 841, 38 L. Ed 2d 77.

II. THE WARRANTLESS ARRESTS AND SEIZURE OF MARIJUANA

Any evaluation of the constitutionality *vel non* of the warrantless seizure of the 467 bales of marijuana requires the application of a number of basic legal principles to the fast-developing factual situation which confronted the state troopers and customs officers on the scene. The circumstances to be considered in the light of applicable constitutional principles are those pertaining to:

1) The presence of the two officers stationed in the cane fields.

2) The warrantless arrest of the petitioners.

3) The warrantless seizure of the truckload of marijuana.

1. *The presence of the two officers in the cane fields.*

It must be borne in mind that the two officers in the cane field were there for the purpose of observing and reporting the movements of three large vehicles parked on the roadway adjoining the cane field (Tr. 432, 437-438, 566, 626). This roadway was outside of petitioners' fenced-in curtilage, and connected a parish road with an intersecting highway (Exs. D6, 8, 9; Tr. 441). There were no gates, signs, or other indi-

cations that it was a private road (Tr. 524). There was no attempt by petitioners to conceal the three trucks under surveillance. They were parked in full view of the nearby public highways as well as in full view of the cane field in which the officers had stationed themselves (Exs. D6, 8, 9, Tr. 580, 624).

The officers had selected the cane field as the point from which to conduct their surveillance for the obvious reason that their presence on the public roads would have alerted the suspects, thus defeating the whole purpose of the surveillance (Tr. 580). This purpose, it must be emphasized, was simply to observe and report the movement of the vehicles - - not to search for marijuana (Tr. 432, 437-438, 484). In fact, the officers did not expect that there would be any marijuana in the vehicles or on the premises (Tr. 384, 437-438, 484). It was anticipated that the vehicles would be leaving to pick up a large quantity of marijuana elsewhere. When this movement shoud begin, the officers in the cane field were to alert their fellow-officers by radio in order that the latter might follow the vehicles to their unknown loading point (Tr. 437-438). This factual situation is conceded by petitioners at page 44 of their brief before the Louisiana Supreme Court.

Apparently fee title to the cane field was in the Dupuis family, although the land was being farmed by another person, through some unspecified tenancy arrangement. There were no signs or fences enclosing the cane field or separating it from adjoining cane fields or prohibiting entry by outsiders (Tr. 519, 524, 525, 538, 539). The curtilage itself was separated from the roadway and adjoining fields by a hurricane fence (Tr. 507, 539).

In the light of these facts and circumstances, we turn now to the pertinent principles of law to determine whether the officers in the cane field violated any constitutional rights of petitioners simply by observing the three vehicles from that

vantage point.

Implicit in the overwhelming majority of the "open fields" cases has been the circumstance that the officers in those cases were guilty of "technical trespass" in that they were on another's property without permission. (cf. *State v. Fearn*, 345 So. 2d 468 (La. 1977), where the officers were on a neighbor's property with consent.) Yet the "open fields" doctrine first enunicated by Mr. Justice Holmes in *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L.Ed 898 (1924), is still viable, and the courts have never permitted a "mere technical trespass" to "transform an otherwise reasonable investigation into an unreasonable search." *United States v. Johnson*, 561 F.2d 832, 841 (1971) (USCA D.C.)

> "We agree with the *Gonzales (State v. Gonzales*, 388 F. 2d 145 (5th Cir. 1968) court that common law property concepts are not particularly illuminative of Fourth Amendment problems; and we take the "technical trespass" terminology of the Seventh Circuit as reflecting the same point of view. ***The question always remains one of whether the police action was reasonable under all the circumstances.*** " *United States v. Johnson*, supra, footnote 10, p. 841, (emphasis added).

The United States Court of Appeals for the Fifth Circuit has held that when an officer, in the performance of his official duties, finds it reasonably necessary to enter upon private property, his conduct, even though technically a trespass, is justifiable.

> "Here the original tip plus the sighting from the air dictated a police investigation to determine whether stolen goods were being transported. Under the circumstances an entry onto the property for the purpose of making a general inquiry was justifiable." *United States v. Knight*, 451 F.2d 275, 278 (5th Cir.

1971); *cert. den.* 405 U.S. 965, 92 S. Ct. 1171, 31 L. Ed.2d 241 (1972) and cases cited therein.

It follows that even if the two officers' presence in the cane field were a technical trespass, such trespass in itself had no adverse impact upon the constitutional consequences of any ensuing seizure, or arrest. ***Atwell v. United States,*** 414 F.2d 136, 138 (5th Cir. 1964).

That the concept of "technical trespass" is not the touchstone, but rather that the courts will look to defendants' "reasonable expectation of privacy" was made clear in ***Katz v. United States,*** 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the leading case on the "reasonable expectation of privacy" rule, wherein the Court said:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

The *Katz* decision was carefully analyzed by the Louisiana Supreme Court in ***State v. Nine*** 315 So. 2d 677 (La. 1975), where the Court reiterated that "it is defendant's right to privacy, not a specific place, which is protected by the Fourth Amendment." *Nine,* supra, at p. 671. A footnote in the *Nine* opinion, at p. 671, quoted Justice Harlan's concurring opinion in *Katz* to the effect that, to fall within the protection of the Fourth Amendment, a person's subjective expactation of privacy must be one that society is prepared to recognize as reasonable.

This same concept of the "objective reasonableness" of an expectation of privacy has been referred to repeatedly by appellate courts as a ***sine qua non*** of Fourth Amendment protection. In ***Rakas v. Illinois***, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), Mr. Justice Rehnquist, writing for the majority, said:

> "Obviously, however, a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off-season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence . . . is "wrongful"; his expectation is not "one that society is prepared to recognize as "reasonable".

In determing whether "the law recognizes a subjective expectation of privacy as legitimate", the United States Court of Appeals for the Fifth Circuit has frequently relied upon the concepts of "open fields", *Hester v. U.S.*, supra, and "curtilage". In *U.S. v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978), the Court said:

> "Although the expectations test has done away with outmoded property concepts no longer satisfactory for fourth amendment analysis . . . the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations . . . We have held that open fields surrounding a house are not protected under the fourth amendment and that a search of them need not be accompanied by a warrant issued upon probable cause".

The Court then held that "the outer limits of the curtilage are defined by the walls of the remote outbuildings. Certainly such buildings give an added expectation of privacy for their contents, ***but we see none as to the area outside and beyond them.***" (emphasis added) *Williams*, supra, at 454. The Court went on to say:

> "Because the agents in this case did not intrude upon the curtilage so defined, but merely detected the odor of mash while standing outside the curtilage,

their furtive trespass, though carried to the very verge of propriety, does not render the search warrant invalid" (at p. 454.)

See also ***Fixel v. Wainwright***, 492 F.2d 480 (5th Cir. 1974) where the Fifth Circuit Court of Appeals declared (at p. 483):

> "In defining the surrounding area entitled to such protection, the courts historically have found helpful the common law concept of curtilage, meaning "yard, courtyard or other piece of ground included ***within the fence surrounding a dwelling house.***" (emphasis added)

In ***Nine***, supra, the Louisiana Supreme Court quoted with approval from ***United States v. Fisch***, 474 F.2d 1071, ***cert. den.*** 412 U.S. 921, 93 S. Ct. 2742, 37 L. Ed. 2d 148 (1973) as follows:

> "The test applied as to society's tolerance of the search rests, as it has for years, upon 'the facts and circumstances - - the total atmosphere of the case'. There is no ready formula, 'each case is to be decided upon its own facts and circumstances.' What we undertake, actually, is a balancing process, a weighing of the social factors involved. Or, as Judge Duniway put it in the pre-Katz case of ***Smayda v. United States,*** 352 F.2d 251, (9th Cir. 1965), ***cert. den.*** 382 U.S. 981, 86 S. Ct. 555, 15 L. Ed. 2d 471 (1966), 'The public interest in its privacy, we think, must to that extent, be subordinated to the public interest in law enforcement,' " (315 So. 2d 667 at 671).

As in ***Nine***, supra, the initial question here is whether the entry of the officers into the adjoining open fields violated

petitioners' justifiable expectation of privacy (see footnote 2 at 315 So. 2d 671). ***State v. Byers,*** 359 So. 2d 84, 86 (La. 1978). Applying that yardstick as defined above to the facts at hand compels the conclusion that the petitioners herein had no ligitimate and reasonable expectation of privacy, ***especially insofar as an exterior surveillance of the three trucks was concerned.*** See *U.S. v. Grimes*, 426 F.2d 706, 708 (5th Cir. 1970) where the Court upheld the legality of an agent's actions in observing the loading of untaxed liquor into an automobile, while the agent was in a field belonging to another, and the observations were by means of binoculars from a distance of about fifty yards.

In the case under consideration, the three trucks were parked on an open shell roadway which connected two public highways. This roadway, although privately owned, had no signs or gates barring public use, and there was nothing to distinquish it from a public road. ***The trucks were parked outside the hurricane fence that surrounded the Dupuis curtilage*** (tr. 507, 539), and they were easily visible from the public roads as well as from the open cane fields surrounding the curtilage. The petitioners, having "knowingly exposed" the trucks to public view, ***Katz v. United States,*** supra, could not have had any reasonable expectation of privacy concerning an exterior view of the vehicles - - they simply didn't care, so long as the ***contents*** of those vehicles remained concealed.

The ground surveillance was undertaken as a result of intelligence information transmitted through normal criminal intelligence channels (Tr. 349-354, 623). This information was to the effect that specific persons, with possible prior marijuana trafficking connections, had assembled at the Dupuis residence, along with three large trucks having no apparent legitimate purpose. Although much of this information clearly was hearsay, it was reliable enough to raise suspicion and to form a reasonable basis for further investigation and to contribute to what later developed into probable cause for arrest. *United*

States v. Matlock, 415 U.S. 164, 94 S. Ct. 998, 39 L. Ed. 2d 242 (1974), *United States v. Knight*, supra. The officers might have set up their nighttime observation of the three trucks from either the public roads (as they had been doing all afternoon in their moving surveillance) or the adjoining cane fields without violating anyone's reasonable expectation of privacy. They chose the cane field for security reasons only.

The instant situation is easily distinguishable from that in *State v. Byers*, supra, where the officers had trespassed onto private land, obviously barred to the public, for the sole purpose of searching for and seizing marijuana plants not otherwise visible. It is also different from *State v. Fearn*, 345 So. 2d 468 (La. 1977), where the officers entered an adjoining field with the consent of the owner for the specific purpose of viewing marijuana plants in defendant's field, the defendant having unsuccessfully attempted to conceal the plants from outside view, thereby attaining a reasonable expectation of privacy.

The present factual situation is more closely analagous to *Nine*, supra, in that :

> ". . . there was not any unreasonable intrusion into the area where the defendant had a reasonable expectation of privacy which society would consider reasonable under these circumstances; the side yard, while enclosed, was used as a passageway. It was not an area where the defendant had a reasonable expectation of privacy. . ." (315 So. 2d at 672)

As was held by the Louisiana Supreme Court in *State v. Wilbourn*, 364 So. 2d 995, 996 (La. 1978) *Cert. Den.*, 100 S. Ct. p. 46 (1979):

> ". . . the test is not only whether the person had an actual (subjective) expectation of privacy, but also

whether the defendant's expectation of privacy is of a type which society at large is prepared to recognize as being reasonable."

In *Wilbourn*, supra, the area in question was an open carport, easily accessible to visitors, delivery men, salesmen, and other members of the public, "including police officers on an investigatory mission". The Court concluded that this accessibility to outsiders must have been "reasonably within the contemplation of the accused". Likewise, the present petitioners must have contemplated the easy accessibility of their activities to public view. This is apparent from the measures taken to conceal the nature of the ***activities within the trucks*** while accepting the fact that the ***trucks themselves*** were open to public view from all sides. There was no reasonable expectation - subjective or objective - of privacy as to the exterior view of the trucks.

It is respectfully submitted that the officers' presence in the adjoining cane fields for the purpose of observing the movement and departure of the trucks on the roadway was not in violation of Fourth Amendment guarantees.

2. ***The warrantless arrest of appellants***

The evidence at the pre-trial hearing disclosed that, while the officers in the cane field were awaiting the departure of the three vehicles parked on the roadway outside petitioners' fenced-in curtilage, they observed a sudden spurt of activity in the area of the vehicles. The two smaller trucks were backed up flush with the back end of the large refrigerator van and sounds of loading activity were heard. Although the lights in the area had been extinguished (this was near midnight), and the trucks were being maneuvered without lights, the interior dome light from the cargo compartment of the smaller truck illuminated the interior of the large van as they were backed together and as they were separated. The officers in

the field, using binoculars and night-vision devices, as well as the naked eye, observed what they, from their experience and training, recognized as bales of marijuana (Tr. 470-478, 568 - 572). (NOTE: Petitioners' brief does not mention the fact that the bales of marijuana were seen by the unaided eye of one of the officers in the field.)

This totally unexpected development was reported to the command post by radio and, over Sergeant Trahan's objections, Customs Officer Joachim attempted to get the search warrant by telephone (Tr. 632).

As soon as the telephone call for the search warrant had been completed, Sergeant Trahan of the Louisiana State Police made plans for the immediate arrest of the persons on the roadway and seizure of the contraband in their possession. He ordered two of his subordinates, Troopers LeMaire and Theriot, to carry out the arrests, and this was done immediately upon receipt of Trahan's order to move in (Tr. 649, 669). Six persons were actually inside one of the trucks, surrounded by bales of marijuana, at the time of their arrest (Tr. 669, 671-672). The seventh suspect attempted to flee and was arrested by Trooper Theriot a short distance from the trucks (Tr. 649-650, 689).

The other officers moved in, the petitioners were taken into custody, and the 467 bales of marijuana in two of the trucks were seized (Tr. 674). Some of the officers later entered the curtilage to determine who else might be present in the area. This entry, however, occurred subsequent to the arrest of appellants and seizure of the marijuana and had no effect thereon.

From the foregoing recital it is clear that the surveillance team was confronted with a sudden and unexpected turn of events. Instead of observing and reporting the departure of the three trucks to a distant marijuana transfer point, the officers

suddenly realized that they were watching a felony in progress. There, in "plain view" was a group of individuals, already suspected of marijuana trafficking, surreptitiously transferring a large quantity of materials that, to these experienced narcotics officers, reasonably appeared to be bales of marijuana. At that point, the officers were not only authorized, they were duty-bound, to move in for the arrests and seizure of the contraband. Overlying the entire situation was a sense of urgency, for the trucks obviously were being prepared for movement.

Under Louisiana law, a peace officer may arrest without a warrant when the person to be arrested has committed an offense in his presence or when the officer has reasonable cause to believe that the person to be arrested has committed an offense, even though not in the peace officer's presence. Article 231, C.Cr.P.

What constitutes "probable cause" for the purpose of a warrantless arest has been exhaustively defined in *State v. Linkletter* 345 So. 2d 452, 455 (La. 1977), which includes the basic principles that :

> "Reasonable belief - - or 'probable cause' as it is termed under the federal standard - - to make an arrest without a warrant exists when the facts and circumstances within the arresting officer's knowledge, and of which he has reasonable trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a felony has been or is being committed." (citing cases)
>
> * * * *
>
> "And in determining compliance with these standards it is not the proof required for conviction which concerns us. Proof required to satisfy the requirement of reasonable belief or probable cause is less and is what

the terms imply; probabilities and practical considerations of everyday life on which reasonable men could reasonably be expected to act." (citing cases)

* * * *

"In such cases, because only factual issues are presented by the contentions, the setting in which the arrests took place becomes a factor of prime importance; facts and circumstances known to the arresting officers from which they might draw conclusions warranted by their training and experience become the focus of our attention with due allowance for the discretion vested in the trial court." (citing ceses)

The foregoing principles when applied to the facts at hand compel the conclusion that "the facts and circumstances known to the arresting officers" were such that "they might draw conclusions warranted by their training and experience" that would justify their "belief that a felony was being committed."

The facts, being crucial, although already related above are worthy of brief repetition. The officers had received information from their official criminal intelligence center concerning an assembly of persons at the Dupuis residence. Several of these persons had previously been the subjects of criminal investigation for narcotics trafficking. Upon the arrival of a strange vehicle at the Dupuis residence around midnight, the lights were extinguished. and the petitioners were seen to leave the fenced area and go out upon the roadway. Thereafter, the three trucks on the roadway were manuevered in total darkness. One of the three trucks was a large eighteen-wheeled refrigerated vehicle, of a type known to the experienced narcotics officers as frequently used for the shipment of marijuana (Tr. 626 - 627). Still in total darkness, the movement of materials from one truck to another could be heard by the officers. Then, through carelessness of the persons engaged in the off-

loading, the interior of the large van was accidently illuminated and its contents fully exposed to the view of the nearby officers. With the naked eye and regular binoculars, as well as with their nightvision equipment, the officers clearly saw stacks of large burlap bales. From their experience and training, these officers immediately recognized that they were viewing a great number of bales of marijuana. At that moment, what had been mere suspicion, bringing on the ground surveillance, ripened into "reasonable" or "probable" cause to arrest. That the officers could not yet smell marijuana or see the gleanings at that point does not negate the existence of probable cause based upon what they did see and hear. Proof beyond a reasonable doubt was not required for the ensuing arrests - - only "probabilities and practical considerations of everyday life." *Linkletter*, supra; *State v. Boyd*, 349 So. 2d 1256 (La. 1977).

In a case involving perhaps less probable cause for warrantless arrests and seizure of marijuana than exists here, the U. S. Court of Appeals for the Fifth Circuit declared:

> ". . . . The fair inference from the evidence was that the surveilling officers were experienced in apprehending those engaged in the drug traffic and that the sacks which were being unloaded were known to them to be of the type used in packaging marijuana." *U. S. v. Lopez-Ortiz*, 492 F.2d 109, 112 (5th Cir. 1974)

In *United States v. Worthington*, 544 F.2d 1275 (5th Cir. 1977) at p. 1277, the Court said:

> "Observation of the burlap sacks containing brick-shaped objects in plain view justified the arrest and subsequent search."

3. *The warrantless seizure of the marijuana*

a) *Incident to the arrests*

Once the validity of the warrantless arrests is established, there can be no difficulty with the seizure of the marijuana in which the arrestees were practically immersed. At the moment of arrest, six of the petitioners were in the smaller truck, with several bales of marijuana immediately behind them, and one bale at their feet (Tr. 672). The larger truck, now almost fully loaded (Ex. D-10), was right in front of them and less than two feet from the arresting officer's face (Tr. 684). Under those circumstances the officers had every right to seize the contraband.

La. R. S. 40:989 A (1) declares that all controlled dangerous substances which have been produced, manufactured, distributed or dispensed or acquired in violation of this part "shall be subject to forfeiture". La. R. S. 40:989 B (1) further provides that such substances may be seized without process when "the seizure is incident to an arrest with probable cause."

It follows that once the arrests with probable cause were accomplished, the marijuana could be seized as incident to those arrests.

In *United States v. Johnson*, supra, the Court, in a similar case, said:

> "When the police had seen a crime actually in progress with contraband in plain view, upon entry into the premises, they were fully authorized both to make arrests and to seek out the contraband." (at p. 841).

b) *"Plain view" seizure*

Assuming, for the purpose of this argument, that there has been no arrests as discussed above, the marijuana would still have been legally seized under the "plain view" doctrine. The two officers in the cane field were observing the trucks from a vantage point that did not intrude upon an area pro-

tected by the Fourth Amendment. Thus, they were "in a place where they had a right to be", at least within the constitutional concept of protected areas.

From their vantage point, the officers, because of petitioners' momentary carelessness, suddenly and inadvertently observed that which they did not expect to see - many bales of what they immidiately recognized as marijuana. It was obvious that the loading was almost complete and that time was of the essence - so much so that Sgt. Trahan argued against even trying to secure the telephone warrant. It was imperative that the officers should have acted before the trucks should get to the open highway with all of the dangers attendant upon seizure of a moving vehicle on a public road. Clearly, this was a "plain view" situation. *State v. Parker*, 355 So. 2d 900, 902 (La. 1978).

The abortive attempt to obtain the federal search warrant and the failure to attempt to obtain a state search warrant do not taint the legality of what actually occurred. As was said in *Cooper v. California*, 386 U.S. 58, 62, 87 S. Ct. 788, 791, 17 L. Ed 2d 730 (1967):

> "It is no answer to say that the police could have obtained a search warrant, for ' (t)he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable! *United States v. Rabinowitz*, 339 U.S. 56, 66, 70 S. Ct. 430, 435, 94 L. Ed. 653".

CONCLUSION

It is respectfully submitted that the courts below fully considered and correctly applied existing federal constitutional law to the facts of the case before them. There is nothing novel about the manner in which the lower courts applied the principles of *Katz v. United States*, supra. A careful reading of the Louisiana Supreme Court's decision in this case (found in Appendix B of petitioners' brief) discloses a marked recognition of the federal constitutional issues involved, and a careful and correct application of controlling constitutional cases. Accordingly, it is respectfully submitted that petitioners' application for the writ of certiorari in this matter should be denied.

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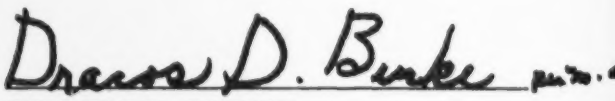
CERTIFICATE OF SERVICE

I certify that three copies of this brief have been served on petitioners named herein by depositing the same in the United States mail, first class postage prepaid, properly addressed to petitioners' counsel, Mr. Ferdinand J. Kleppner, of Grisbaum and Kleppner, 3224 North Turnbull Drive, Metairie, La. 70002 and Edward T. M. Garland, 1012 Candler Bldg., Atlanta, Ga. 30303, this 20th day of July, 1980.



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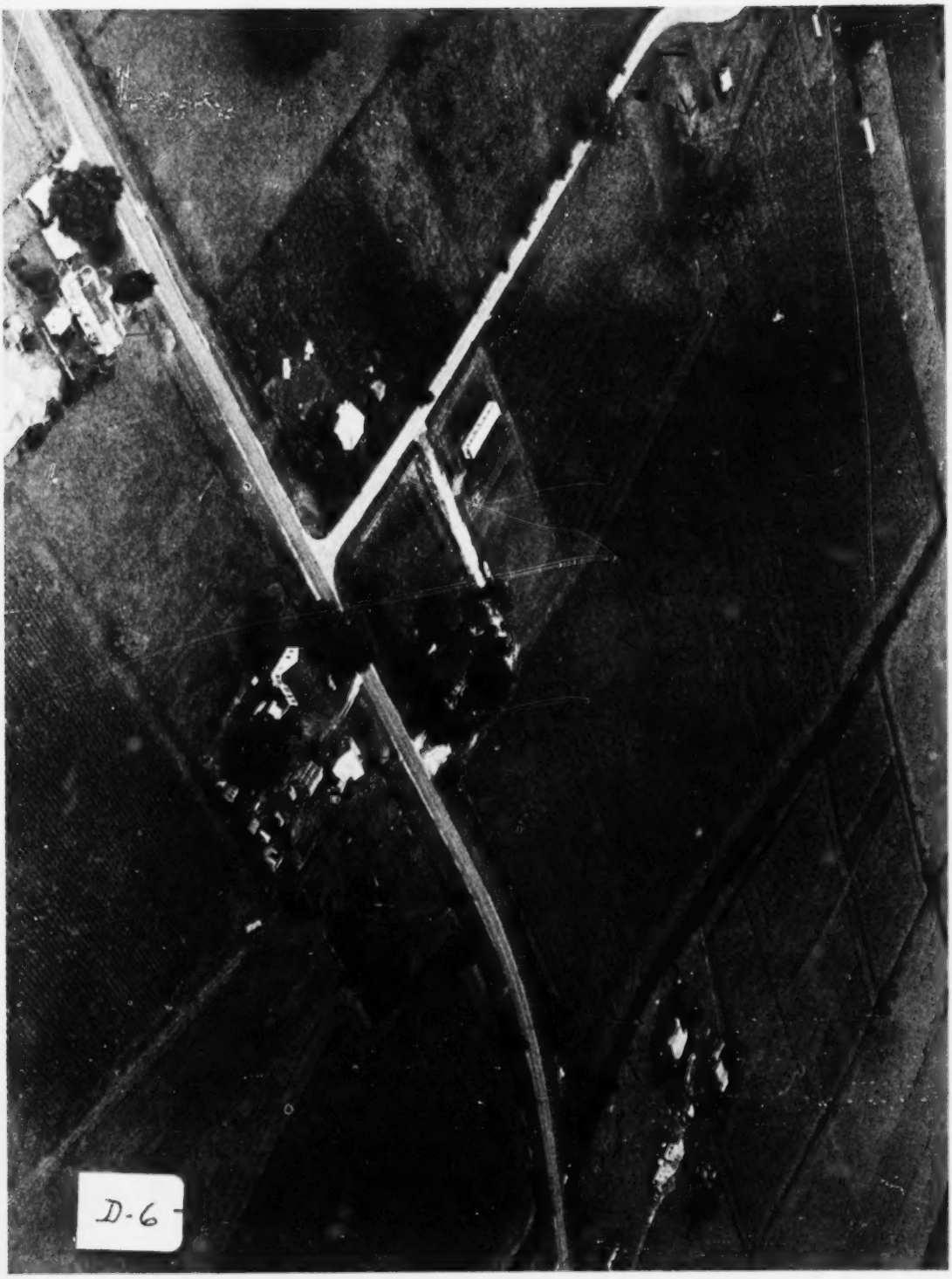
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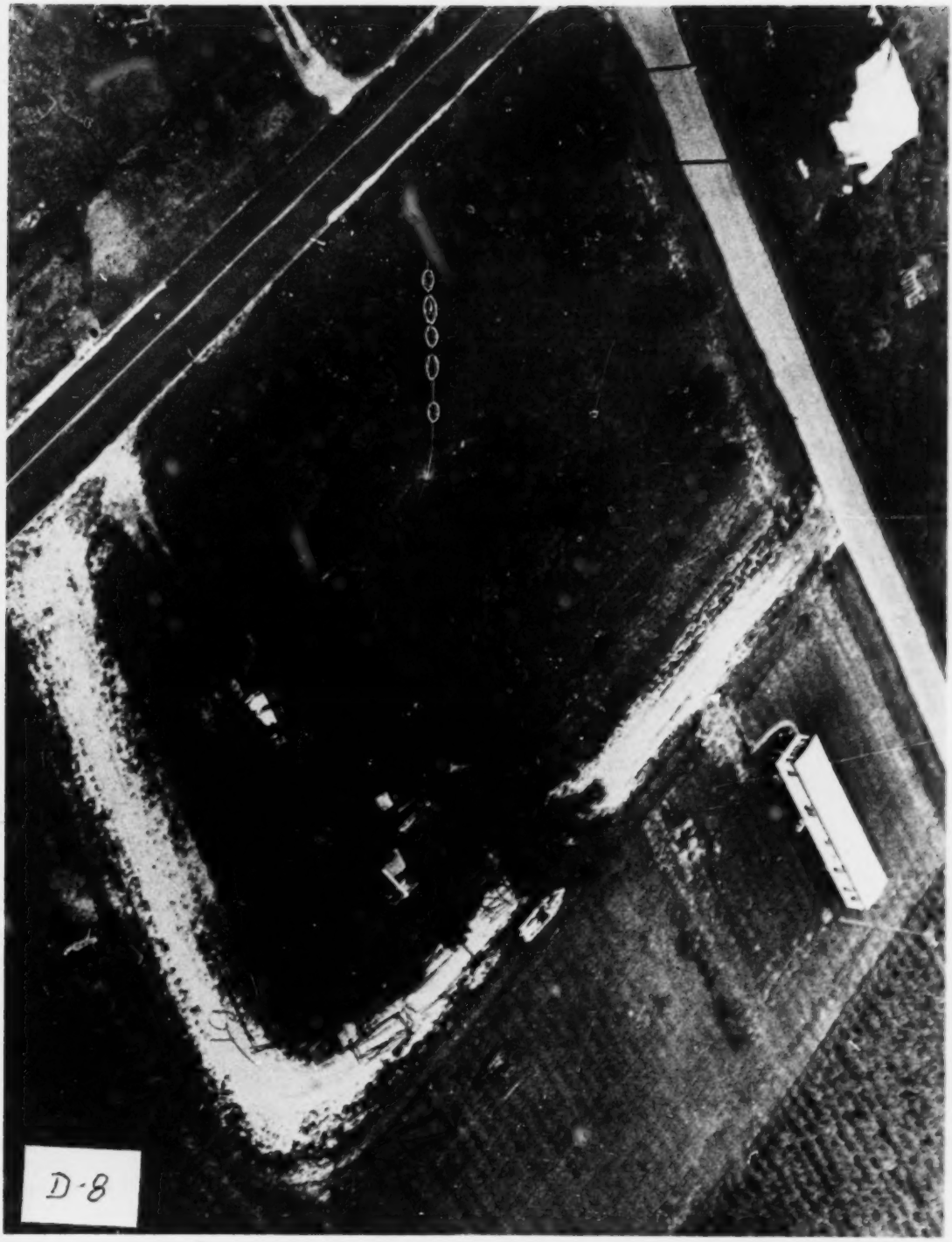
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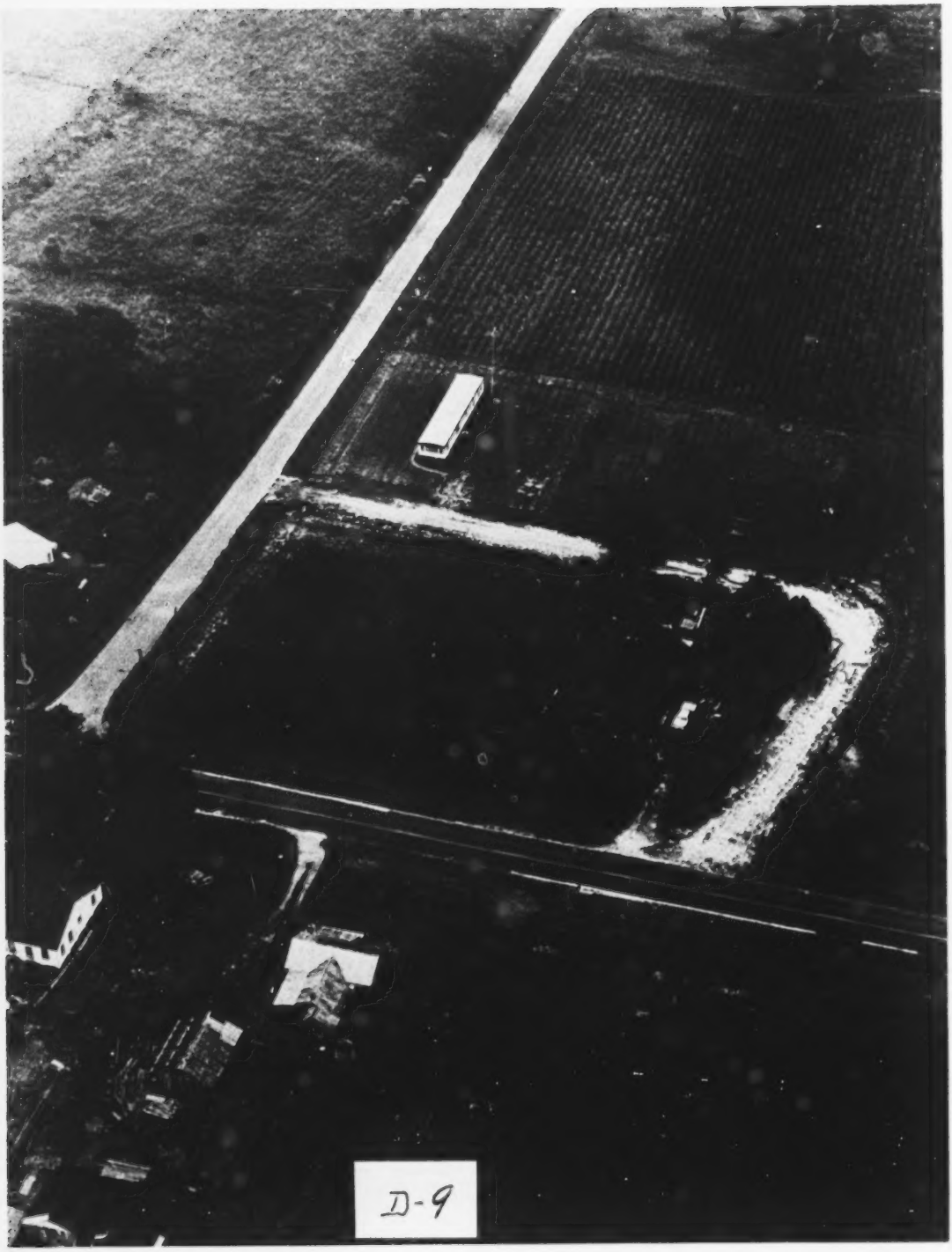
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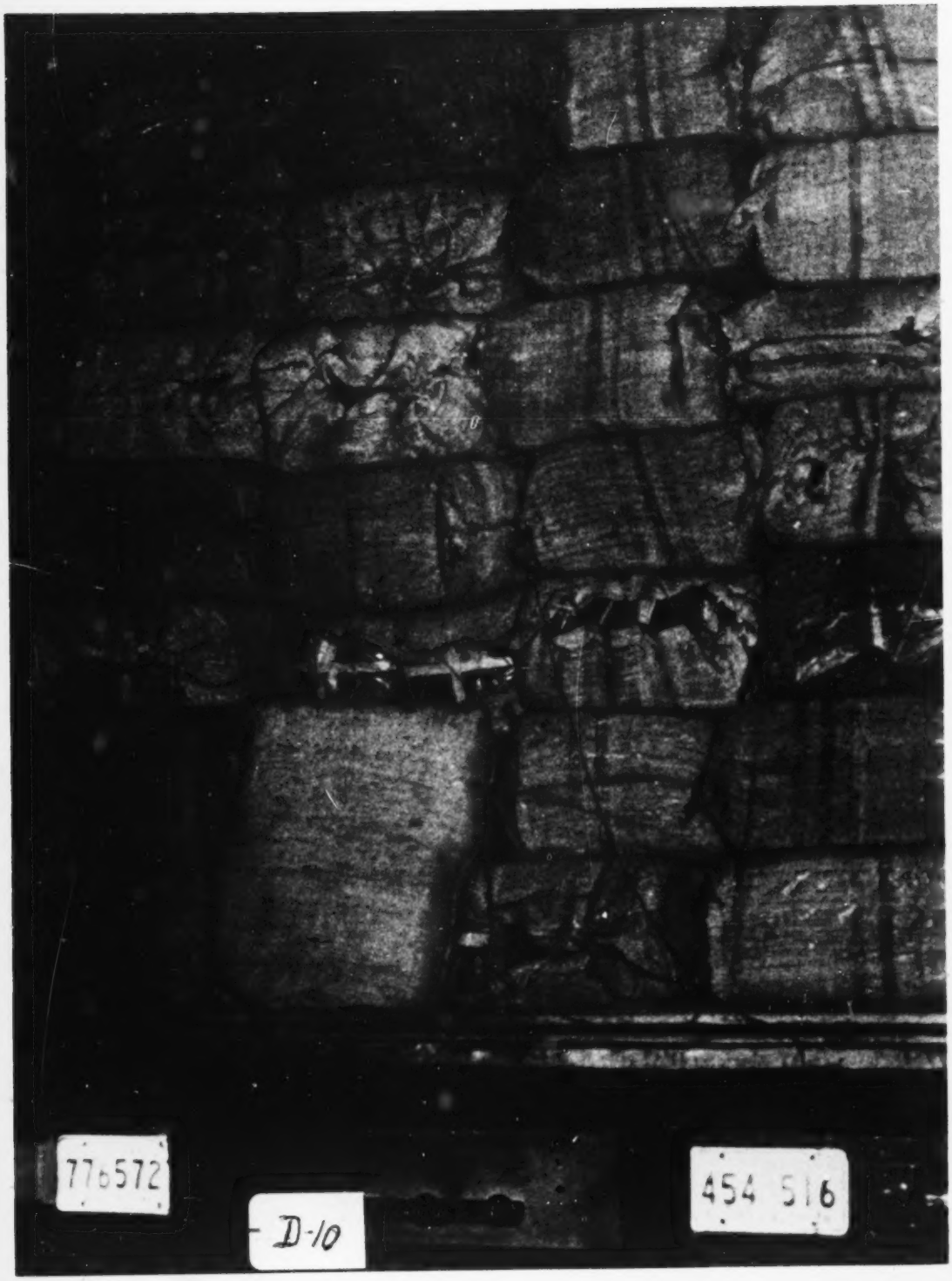
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